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Supreme Court of the United States.

OCTOBER TERM, 1951.

OLIN INDUSTRIES, INC.,
WINCHESTER REPEATING ARMS COMPANY
DIVISION,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Olin Industries, Inc., Winchester Repeating Arms Company Division, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (hereafter called the Court below), entered in this cause August 7, 1951, enforcing an order of the National Labor Relations Board (hereafter called "the Board"); to review an order of the Court below, entered November 17, 1951, denying petitioner's petition for rehearing; and to review a further order of the Court below, entered January 14, 1952, denying petitioner's application for leave to file a second petition for rehearing and to adduce additional evidence.

Opinions Below.

The opinion of the Court below (T. 340),[1] filed August 7, 1951, is reported at 191 F. (2d) 613. The opinion of the Court below denying petitioner's petition for rehearing (T. 379), filed November 17, 1951, is reported at 192 F. (2d) 799. The order of the Court below denying the petitioner's application for leave to file a second petition for rehearing and to adduce additional evidence (T. 403), filed January 14, 1952, is not yet reported. The decision and order of the Board (T. 143) are reported in 86 N.L.R.B. 209.

Jurisdiction.

The judgment of the Court below was entered August 7, 1951 (T. 349). A petition for rehearing, filed September 17, 1951 (T. 351), was denied November 30, 1951 (T. 387). An application for leave to file a second petition for rehearing and to adduce additional evidence, filed on December 31, 1951 (T. 383), was denied January 14, 1952 (T. 403). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1), and under Section 10 (e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Sec. 151 *et seq.*), hereinafter called "the amended Act."

Questions Presented.

I. Whether the provisions of Section 9 (f), (g) and (h) of the amended Act prohibit the Board from issuing an unfair labor practices complaint on the basis of a charge

[1] The letter "T" signifies the certified printed transcript of record.

filed by an individual, an attorney, where the charging party acts as a "front" or "agency" for a labor organization not in compliance with the filing requirements of the said section of the amended Act in filing a charge which alleges the commission of unfair labor practices against persons other than the charging party.

II. Whether the provisions of Section 10 (b) of the amended Act prohibit the Board from—

(1) issuing an unfair labor practices complaint *after* the effective date of the amended Act on the basis of a charge, filed with the Board *between* the enactment and effective dates of the amended Act, and alleging the commission of unfair labor practices *more* than six months prior to the filing of the charge; and

(2) amending the said complaint by adding allegations of discriminatory discharges, never before incorporated in any charge or complaint, where the amendment is made at a time more than six months after the date of the additional alleged discriminatory discharges *and* more than six months after the effective date of the amended Act.

III. Whether the provisions of Section 10 (b) of the amended Act prohibit the Board from issuing an unfair labor practices complaint on the basis of a charge that is not served upon the charged party by any of the four methods of service prescribed by Section 11 (4) of the amended Act and by Section 203.63 of the Board's Rules and Regulations, in the absence of any proof of actual receipt of the charge by the charged party.

IV. Whether the Board's finding, and back pay order based thereon, that petitioner was guilty of a discriminatory lockout on September 21, 1946, should be set aside in view of the fact that neither the charge nor the complaint alleged a lockout.

V. Whether, under the amended Act, an employer whose employees engage in a planned series of intermittent work stoppages to protest non-discriminatory changes in work schedules is barred from—

(*a*) discharging the ringleaders;

(*b*) shutting down the plant temporarily for the purpose of restoring orderly operations; and

(*c*) replacing striking employees who refuse to return without the ringleaders.

VI. Whether the Court below grossly misapplied the standard of substantial evidence on the record as a whole in upholding findings that—

(*a*) five individuals named in Appendix A, Group I, of the Board's Order (Beal, Giannelli, Johnson, Tardie and Wayert) were discriminatorily discharged;

(*b*) there was service by ordinary mail of the charge underlying the Board's complaint; and

(*c*) each of the strikers named in Appendix A, Group II, and five of those named in Appendix A, Group I, of the Board's Order (Brown, Raffone, Lonergan, Wilson and Considine) made an unconditional application for reinstatement.

Statutes Involved.

The statutes involved are the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Sec. 151 *et seq.*), and the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. Sec. 1001 *et seq.*), the pertinent provisions of which are set forth in the Appendix, *infra*, at pages 30-34.

Statement of the Case.

This case involves the enforcement by the Court below of an order of the Board (T. 153) which in part directed petitioner to reinstate with back pay 106 employees, of whom 3 were discharged in 1942, 16 were discharged on September 20 and 21, 1946, and the balance of 87 of whom were strikers who were allegedly denied reinstatement on October 21, 1946.

On charges originally filed by a C.I.O. Union the Board had issued a complaint April 21, 1947, and the matter came to hearing on June 30, July 24 and 29, 1947 (T. 169, 170). Upon the Union's request in pursuance of their policy "to have nothing to do with the Taft-Hartley Law," which the Union proposed to by-pass, the hearing was terminated, the charges were withdrawn by the Union and the Board's motion to strike the complaint was allowed (T. 170).[2]

The following day, July 30, 1947, a charge was filed by Marvin C. Gold, an attorney at law. This charge was amended August 4, 6 and 18, 1947. The charges filed by Gold were substantially the same as those previously filed and withdrawn by the Union (T. 170). The complaint was issued April 8, 1948, and a lengthy hearing with almost six thousand pages of testimony was conducted from May 17 to July 15, 1948 (T. 163).

The Trial Examiner on November 24, 1948 issued his Intermediate Report (T. 160). The petitioner filed exceptions (T. 83) and requested leave to argue orally to the Board, which was denied (T. 317). On September 29, 1949, the Board issued its decision and order (T. 143).

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[2] On July 31, 1947, the Board granted the same Union's request to withdraw a petition for investigation and certification of representatives at petitioner's plant, thus terminating a hearing held on that petition. The Union's request was based on the same declared policy to by-pass the amended Act (T. 169).

On June 20, 1950, petitioner filed with the Court below a petition to review and set aside this order. The Board filed a motion to dismiss, which was denied, and then on October 31, 1950, the Board answered and requested enforcement of the order. On August 7, 1951, the Court filed its opinion that the petition to review and set aside should be denied and the Board's order enforced. On December 27, 1951, after denying petitioner's petition for rehearing, that Court issued its decree granting enforcement. The Court subsequently, on January 14, 1952, denied petitioner's application for leave (*a*) to file second petition for rehearing, and (*b*) to adduce additional evidence.

Further statements of fact bearing on petitioner's contentions are set forth below under the heading "Reasons for Granting Writ."

Reasons for Granting Writ.[3]

I.

The decision of the Court below on this issue is in conflict with the recent decision of the Court of Appeals for the Sixth Circuit in the case of *N.L.R.B.* v. *Alside Co.* (C.A. 6), 192 F. (2d) 678, decided November 26, 1951.

At the hearing before the Trial Examiner petitioner's counsel attempted to examine several Board witnesses as to whether Mr. Gold, the charging party, had been authorized by them to file the charges in their behalf. This examination was excluded by ruling of the Trial Examiner. One witness, James T. Evans, testified that he had first met Mr. Gold about a week or ten days before the hearing, although the charges had been filed almost a year before, and

[3] The numbering under this heading corresponds to the numbering of the issues under the heading "Questions Presented."

that that meeting had taken place at the union hall (App. to Petitioner's Brief, p. 24). At that point the General Counsel's representative objected that "it is wholly irrelevant where he met Mr. Gold and what went on there . . ." (App. to Petitioner's Brief, p. 25). The Trial Examiner sustained the objection (App. to Petitioner's Brief, p. 26) but at the request of petitioner's attorney he permitted an offer of proof to be made. The offer of proof is set forth in full at pages 27 and 28 of the Appendix to Petitioner's Brief.

In its exceptions to the Trial Examiner's Intermediate Report the petitioner stated:

> "It is a main contention of the respondent that the hearing upon which the Trial Examiner based his findings and wrote his intermediate report is one that could not be properly held under the law since the motivating force behind the hearing was and is a non-complying Union. That the use of Marvin Chaucer Gold was a front . . ." (T. 99.)

The Board, however, rejected petitioner's contention "that it was prejudiced by the Trial Examiner's refusal to admit evidence purporting to show (1) that the Union, which is not in compliance with the filing requirements of Section 9 (f), (g) and (h) of the amended Act,[4] requested Gold to file the instant charges and turned over to him its files and exhibits including the names and addresses of all the complainants and (2) that Gold was not authorized by the complainants to execute a charge on their behalf," and held that "it is immaterial that he might be acting on behalf of the Union . . ." (T. 143, footnote 2).

The petitioner applied to the Court below under Section 10 (e) of the amended Act (see Appendix, *infra*, p. 32)

[4] See Appendix, *infra*, pp. 30-31.

for leave to adduce additional evidence on this point and this application was denied by the Court *per curiam.*

Three circuits have passed upon this "fronting" question—the Fifth Circuit in the case of *N.L.R.B.* v. *Augusta Chemical Co.* (C.A. 5), 187 F. (2d) 63, the Third Circuit in the case of *N.L.R.B.* v. *Clausen* (C.A. 3), 188 F. (2d) 439, and the Sixth Circuit in the case of *N.L.R.B.* v. *Alside Co., supra.*

The *Augusta* case, *supra,* and the *Clausen* case, *supra,* in which the Courts held the restrictions of Section 9 (f), (g) and (h) did not apply, the individuals who were alleged to be "fronting" for a non-complying Union had filed charges naming only themselves as alleged discriminatees.

In the *Alside* case, *supra,* however, the charging individual named himself *and other persons.* Similarly, in the case at bar the charging party named only a mass of other persons as alleged discriminatees; he himself was not even an alleged discriminatee.

It was on the basis of this distinction that the Court in the *Alside* case, *supra,* held that the restrictions of Section 9 (h) did apply to an individual who, in fact, acts not only for himself but who asserts the grievances of others as well.

That holding would require an examination of the question of fact as to whether Marvin C. Gold was a "front" for the non-complying Union, and is accordingly in conflict with the rulings of the Trial Examiner, the Board and the Court in the present case.

In addition, the failure of the Court below to permit examination of the factual question as to whether Gold was fronting for the non-complying Union creates an avenue for a non-complying Union to emasculate, to a large extent, the effect of this Court's decision in *N.L.R.B.* v. *Highland Park Mfg. Co.,* 341 U.S. 322, and therefore con-

stitutes a decision of an important question of Federal law which has not been, but should be, settled by this Court. The resolution of that conflict in favor of the view taken by the Sixth Circuit is vital to prevent complete frustration of the decision of this Honorable Court in *N.L.R.B.* v. *Highland Park Mfg. Co.*, under which decision this issue as to compliance with Sections 9 (f), (g) and (h), being jurisdictional, could properly have been raised in this Court for the first time, even had it not been previously asserted. *Mahler* v. *Eby*, 264 U.S. 32, 45.

II.

The Court of Appeals, in construing the proviso of Section 10 (b) of the amended Act[5] (*a*) has decided an important question of Federal law, as to the jurisdiction of the Board to issue complaints, which has not been, but should be, settled by this Court; and (*b*) has decided it in a way which is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Superior Engraving Co.* v. *N.L.R.B.*, 183 F. (2d) 783 (C.A. 7, 1950); cert. den. 340 U.S. 930, in the same matter, to wit, the power of the Board to issue and amend complaints after the effective date of the amended Act.

As applied to the facts of this case[6] the Court below sanctioned (*a*) the issuance of a complaint more than six months after the effective date of the Act based on charges filed between the enactment and effective dates of the amended Act but more than six months after the occurrence of the alleged violation, and (*b*) the amendment of a complaint more than six months after the effective date

[5] See Appendix, *infra*, p. 31.

[6] Alleged violations occurred in 1942 and in October, 1946; charge was filed July 30, and amended August 4, 6, and 18 (T. 24-38); complaint issued April 8, 1948 (T. 43), and was amended at the hearing (T. 163).

to allege for the first time violations occurring prior to the passage of the amended Act and more than six months prior to the amendment of the complaint and not previously charged.

The amendments to the National Labor Relations Act were enacted June 23, 1947, effective sixty days thereafter, or August 22, 1947. During that sixty-day period the filing and service requirements of Section 10 (b) did not apply; during that sixty-day period the Board had power to issue a complaint based upon a charge filed more than six months after the alleged unfair labor practice and never served.

However, the Board holds and the Court below agrees, in *N.L.R.B.* v. *Itasca Cotton Mfg. Co.*, 179 F. (2d) 504 (C.A. 5, 1950) and in the present case, that under Section 10 (b) the Board could continue *even after August 22, 1947*, to issue complaints upon charges filed and served up to six months after August 22, 1947, even though more than six months elapsed between the occurrence of the violation and the filing and serving of the charge.

In view of the sixty-day lag between the enactment and effective dates of the amendment, petitioner contends that the failure to give full literal effect to Section 10 (b) as written raises a Federal question requiring consideration and decision of this Court.

In the case of *Superior Engraving Co.* v. *N.L.R.B., supra*, the Court of Appeals for the Seventh Circuit held, in conflict with the Court below, that, although it was permissible for the Board to issue a complaint between the enactment and effective dates of the Act based on charges filed before the effective date alleging unfair labor practices occurring more than six months prior thereto, the Board did not have the power after the effective date of the Act to *amend* a complaint upon the basis of charges filed after the effective date and more than six months after the occurrence of the unfair labor practices charged.

In the *Superior Engraving* case, *supra*, the Court of Appeals for the Seventh Circuit referred to the decisions of the Court of Appeals for the Fourth Circuit in *Joanna Cotton Mills* v. *N.L.R.B.* (C.A. 4, 1949), 176 F. (2d) 749, and the Court of Appeals for the Fifth Circuit in the *Itasca* case, *supra*, and clearly disagreed with those decisions on the question of the effect of the proviso in Section 10 (b) upon the power of the Board to issue complaints.

It pointed out that the Court below relied in its decision in the *Itasca* case, *supra*, on the cases of *United States* v. *Morena*, 245 U.S. 392, and *Sohn* v. *Waterson*, 17 Wall. 596, and it distinguished those cases. It pointed out that in both those cases the statute created a period of limitations where none had previously existed and that, in accordance with the well-settled rule in such case, the limitation period begins to run with respect to pre-existing claims on the effective date of the statute.

However, it pointed out further that the Labor Management Relations Act, Title I, Section 104, expressly provided that "The amendments made by this title shall take effect sixty days after the date of the enactment of this Act . . ." It stated that the inclusion of this provision in the Act not only avoids the result which the rule of *Sohn* v. *Waterson, supra*, was designed to avoid, but also indicates an intention on the part of the Congress "that preexisting unfair labor practices, some of which would have been absolutely barred as grounds for the issuance of a Board complaint, had the six month limitation period for the filing of unfair labor practice charges been given immediate retroactive effect, were to be kept alive during the sixty day period until the Act became operative . . ." (183 F. (2d) 783, at 789-790).

Furthermore, the Court below, in deciding this Federal question, decided it in a way probably in conflict with applicable decisions of this Court, in that it declined to

give to the words "no complaint shall issue" in Section 10 (b) the jurisdictional meaning that this Court, in *N.L.R.B.* v. *Highland Park Mfg. Co., supra,* gave to the same clause in Section 9 (g) of the same Act. In the *Itasca* case, *supra,* which governed the Court's decision in the present case, the Court below stated: "Had the Congress intended the proviso to be retroactively jurisdictional, it would have read 'provided the Board shall have no power to issue etc.' " (179 F. (2d) 504, at 507), in which case the Court stated that the respondent would have had a strong position. The identical language "no complaint shall issue" appears in Section 9 (g) of the amended Act, which has been held by this Court in *N.L.R.B.* v. *Highland Park Mfg. Co., supra,* to have jurisdictional meaning and effect.

III.

The decision of the Court below decided an important question of Federal law which has not been, but should be, settled by this Court, in that it permits service of a charge, as required by Section 10 (b) of the amended Act (limiting the jurisdiction of the Board over unfair labor practice proceedings), to be made by ordinary mail, a method other than the four methods authorized by Section 11 (4) of the amended Act and by Section 203.63 of the Board's Rules and Regulations (prescribing the manner of service of Board process and papers). Furthermore, it decides the question in a way that is probably in conflict with applicable decisions of this Court.

The petitioner has been protesting since the first day of the hearing that it had never, prior to the service of the complaint itself in April, 1948, been served with "any charges" (T. 84, 160). In this connection it has contended (*a*) that the Board's claim of service by ordinary

mail is not proved by substantial evidence on the record as a whole, and (*b*) that in any event service by ordinary mail would not satisfy the requirements of the amended Act and the Board's Regulations. The first contention is discussed below.[7] The second is the subject of this discussion.

Judicial construction of the original Section 10 (b) settled that filing a charge was a prerequisite to the Board's jurisdiction over an unfair labor practice proceeding, in the sense that, absent the filing of a charge, the Board was powerless to issue a complaint. *Consumers Power Co.* v. *N.L.R.B.* (C.A. 6), 113 F. (2d) 38. The amended Section 10 (b) imposed a six months' limitation on fulfillment of the filing requirement, and added the further requirement of service of a copy of the charge on the person charged within the same time. The basic jurisdictional nature of both requirements is expressed by the provision that "no complaint shall issue"[8] unless filing and service are accomplished as prescribed.

Section 11 (4) (61 Stat. 136, 29 U.S.C., Supp. III, Sec. 161 (4)) provides in part:

> "Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered

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[7] P. 25.

[8] The identical clause in another Section of the Act, Section 9 (g), was held by this Court in *N.L.R.B.* v. *Highland Park Mfg. Co., supra,* to have jurisdictional meaning and effect.

and mailed or telegraphed as aforesaid shall be proof of service of the same. . . ."

That the word "may" was intended by Congress in this case to be mandatory is evident from the House Conference Report's statement that Section 11 (4) ". . . provides for the manner in which complaints, orders, and other processes of the Board *shall* be served." (Emphasis added.) 1 Legislative History of the Labor Management Relations Act of 1947, p. 562. The necessary inference is that Congress intended no sanction for any method of service other than the four methods expressly set forth, *e.g.*, by ordinary mail.

The Court below, though conceding that service by ordinary mail was a departure from the Board's rules then applicable to service of process and papers,[9] nevertheless held that the departure was "a mere technical defect" and should be disregarded (T. 379). However, there is in issue here *not only* a construction of the Board's rules of procedure, *but also* a construction of an Act of Congress which specifically prescribes the procedure which the Board shall follow in serving its process and papers. It is an axiom, not only of statutory construction but also of constitutional law, that, when a statute creates an administrative agency and imposes upon it a certain course of procedure, then such an agency *must* pursue the procedure imposed and prove compliance therewith in order to give validity to its action. *Wichita Railroad & Light Co.* v. *Public Utilities Commission of the State of Kansas,* 260 U.S. 48, 59. *Mahler* v. *Eby,* 264 U.S. 32, 44. This principle

[9] The National Labor Relations Board Rules and Regulations, Series 4, Sec. 203.63 (29 C.F.R. Ch. II, Federal Register, September 11, 1946). Section 203.63 is identical with the above-quoted provisions of Section 11 (4) of the Act, except that it deletes the word "either" from the third line.

is embodied in Section 6 (b) of the Administrative Procedure Act, 5 U.S.C. Sec. 1005 (b), which provides in part that—

> "No process . . . shall be issued . . . except as authorized by law."

Nor can the so-called rule of prejudicial error (Administrative Procedure Act, Sec. 10 (e)) be invoked, for—

> "The requirement that account shall be taken 'of the rule of prejudicial error' means that a procedural omission which has been cured prior to the finality of the action involved by awarding the party the procedure to which he was originally entitled is not a reversible error." [10]

This is especially true in the case of required service of process, for—

> ". . . the Supreme Court has said that all forms of substituted service in actions purely in personam, constitute departures from the rule of the common law and the *statutory authority therefor should be strictly followed.*" (Emphasis supplied.)

Wise v. *Herzog* (C.A. D.C., 1940), 114 F. (2d) 486, a decision rendered by the Court of Appeals for the District of Columbia while Chief Justice Vinson was a member of that Court.

It is therefore submitted that the Court below, in permitting service by ordinary mail, has decided an important question of Federal law that must be settled by this Court and has decided it in a way not consistent with principles laid down by this Court in other cases involving statutory authorization of substituted service.

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[10] 79th Cong., 2d Sess., H. Rep. No. 1980 (1946).

IV.

In affirming a finding of a lockout, which had not been alleged in either the charge or the complaint and which was not claimed or litigated at the hearing, the Court below has decided a Federal question in a way probably in conflict with the applicable decision of this Court in *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197; in conflict with the decision of the Court of Appeals for the Third Circuit in *N.L.R.B.* v. *Reliable Newspaper Delivery, Inc.* (C.A. 3, 1951), 187 F. (2d) 547, and in conflict with another panel of the same circuit in *N.L.R.B.* v. *Fulton Bag & Cotton Mills* (C.A. 5, 1949), 175 F. (2d) 675, thereby so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The complaint alleged in paragraph 7 that on or about September 21, 1946, the Rolling Mill Department went on strike as a result of the discharge of the three ringleaders (T. 41). That allegation was never amended, nor has there ever been alleged in either the charge or the complaint any lockout at any time.

If that allegation in the complaint is true, the petitioner is under no back-pay liability to the employees for any part of the period from September 21 to October 21, the date of the alleged mass applications for reinstatement. The finding made by the Trial Examiner and Board, and affirmed by the Court below, is that there was a lockout from September 21 to September 29. This finding resulted in an order imposing upon the petitioner financial liability for a period of approximately eight days to approximately one hundred employees.

In *Consolidated Edison Co.* v. *N.L.R.B., supra,* this Court, in setting aside that portion of a Board order requiring the Company to cease giving effect to contracts with an independent labor Union, where the validity of the

contracts was not attacked in the complaint or its amendments, said:

> "If the Board intended to make that charge, it should have amended its complaint accordingly, given notice to the Brotherhood, and introduced proof to sustain the charge." (305 U.S. 197, 238.)

In *N.L.R.B.* v. *Reliable Newspaper Delivery, Inc., supra,* the Court of Appeals for the Third Circuit stated the applicable facts and law as follows:

> ". . . Only four of the eight non-union employees were named in the charge and complaint before the Labor Board . . . The Board, in its order included 'all other non-union employees who were similarly situated . . .' . . . in our view, this action by the Board was unwarranted . . ." (187 F. (2d) 547, 550.)

and added in a footnote:

> "If the Board intended to include all the other non-union employees allegedly similarly situated, the complaint should have been amended accordingly, notice given to respondent and sustaining proof introduced . . ." (187 F. (2d) 547, 550, footnote 4.)

In *N.L.R.B.* v. *Fulton Bag & Cotton Mills, supra,* another panel of the Fifth Circuit, in disapproving a finding of discrimination with respect to five people not alleged in the charge or complaint, although no remedial order was issued on the basis of the finding, said:

> "Finally, as to the gratuitous, the volunteered findings of examiner and board, without charge or complaint to support them, that respondent discriminated in respect of Smith, Rose, Longmire, Kelley, and

> Guthrie, and the consequent condemnation of respondent for having done so, we find no warrant in the statute, none in the elementary conceptions of procedural justice for them. It is true that no consequences were visited upon respondent as a result of these findings, no doubt because it was clearly seen that to punish, as well as to condemn, without a charge and a hearing on the charge would be shocking to fundamental conceptions of justice." (175 F. (2d) 675, 677.)

It is submitted that such an intra-circuit conflict on an identical issue requires resolution by this Court. Cf. *John Hancock Mutual Life Insurance Co.* v. *Bartels* (C.A. 5), 100 F. (2d) 813; cert. granted 307 U.S. 617; aff'd 308 U.S. 180, 181.

It is submitted, in addition, that the holding of the Court below violated Section 5 (a) of the Administrative Procedure Act, which provides that "Persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted. . . ."

It is also in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Joanna Cotton Mills, supra.* In that case the Fourth Circuit held that a charge and complaint could not be *amended* to change the alleged basis of a discriminatory discharge from "union activities" to "concerted activities." *A fortiori,* then, where there is not even an amendment of the charge or complaint and where there is a finding of discrimination (involving back pay) where no discrimination at all had been alleged, the action would not be permissible under Section 10 (b) of the National Labor Relations Act as amended.

If the holding of the Court below is valid, then the decision in the *Joanna* case, *supra,* can be nullified by the simple expedient of embodying the new matter in findings and orders without bothering to amend the complaint.

V.

In sanctioning the utilization by employees of a planned series of intermittent work stoppages, including a four-hour sit-down strike, and in according to that weapon the status of a protected concerted activity under the amended National Labor Relations Act, the Court below rendered a decision probably in conflict with the decisions of this Court in *International Union, U.A.W.A., A.F. of L., Local 232,* v. *Wisconsin Employment Relations Board,* 336 U.S. 245, and *N.L.R.B.* v. *Fansteel Metallurgical Corp.,* 306 U.S. 240. Furthermore, the decision of the Court below in this case, in affirming the Board's finding that discharge of the ringleaders of the first of the planned series of intermittent work stoppages was in violation of the amended Act, and that the shutdown of the plant after the second stoppage for the purpose of preventing further stoppages was an illegal lockout, has decided an important question of Federal law which has not been, but should be, settled by this Court, and has decided it in a way which is not consistent in principle with the decision of the Court of Appeals for the Seventh Circuit in *Morand Bros. Beverage Co.* v. *N.L.R.B.* (C.A. 7), 190 F. (2d) 576. In denying to the petitioner the right to replace employees who strike as a result of such discharges and shutdowns, the Court below has decided an important question of Federal law which has not been, but should be, decided by this Court.

There is little dispute as to the facts of the occurrences of September 15, 1946. The petitioner had announced some non-discriminatory changes in work schedules of the Rolling Mill Department. The employees of that department then agreed upon a plan of a series of intermittent temporary work stoppages in protest, during which interval a committee would undertake to present demands to management (T. 212). The men on the first shift, as part of this plan, and without advance warning to the petitioner,

refused to resume their jobs at the conclusion of their lunch period and resisted all orders of management to return to work or leave the premises (T. 213). The ringleaders were Bonito, Baldino and Destadio (T. 215). At the conclusion of fifteen minutes and after the Chief of Police had been called, the employees went back to their tasks at the direction of Destadio (T. 214, 217). Bonito, Baldino and Destadio were discharged because of their part in this first stoppage (T. 147).

The events on the second shift were more aggravated. The men refused to return to work at the conclusion of their lunch period and persisted in their refusal to either work or leave the premises until 11 p.m., some four hours later, the time when their shift would have ended in any event, despite having several times been ordered either to work or to leave the premises (T. 224). Foreseeing a continuation of the same difficulty, the petitioner did not open its plant for the third shift (T. 224-225).

The effect of the Court's decision to enforce the Board's order based on findings that the work stoppages were protected concerted activities, that the discharges were in violation of the Act and that the shutdown was a discriminatory lockout (T. 147, 148) is inconsistent with the holdings and principles enunciated by this Court in *International Union, U.A.W.A., A.F. of F., Local 232,* v. *Wisconsin Employment Relations Board, supra.*

In that case, the State Board had held it to be an unfair labor practice under Wisconsin law for the Union to conduct a planned series of "recurrent and unannounced stoppage of work." This Court, in reviewing the decision of the Wisconsin Supreme Court's enforcement of the cease and desist order of the State Board, held that the

> ". . . recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbid-

> den by federal statute *nor was it legalized and approved thereby. . . .*" (336 U.S. 245, 264-265.) (Emphasis supplied.)

Although this Court then mentioned the absence of specific demands, it is apparent that the more important test is whether the stoppages were part of a planned series or were isolated, as in *American Mfg. Co.*, 5 N.L.R.B. 443, 106 F. (2d) 61 (C.A. 2); aff'd as modified 309 U.S. 629, a case which was distinguished by this Court in the *International Union* decision, *supra*, but which was followed by the Trial Examiner and the Board in the present case without regard to the distinction between planned and isolated stoppages (T. 252).

The Board condoned the sit-down by the second shift on the ground that the reason given by the sit-down strikers for their refusal to leave was that they had been previously told that failure to work that Saturday would result in discharge and they therefore refused to obey management's orders to yield the premises unless given "a written agreement that everything was O.K." (T. 224). This condonation is not supported or warranted by, in fact is in contravention of, this Court's decision in the *Fansteel* case, *supra*.

If the holding, made by the Board and sustained by the Court below, that the planned series of intermittent work stoppages (including the four-hour sit-down strike) is a protected concerted activity under the Act is set aside, it will follow that the discharge of the ringleaders is not in violation of the Act.

This Court's reasoning in *International Union, U.A.W.A., A.F. of L., Local 232*, v. *Wisconsin Employment Relations Board, supra*, included a conclusion that it would be "inconsistent with the whole purpose" of the amended

Act to leave the employer without any kind of self help ("to dismiss or discipline employees") to combat these tactics (336 U.S. 245, 264). For the sit-down phase, the *Fansteel* case is express authority for the right to dismiss.

The shutdown stands on a different footing. The finding of a discriminatory lockout presents the question whether an employer whose employees are conducting a planned series of intermittent work stoppages, albeit the employees are acting for a proper purpose under the Act, may shut down his plant for the purpose of restoring orderly operations. This question was not involved in *International Union, U.A.W.A., A.F. of L., Local 232,* v. *Wisconsin Employment Relations Board, supra,* and was therefore not decided there. It should be decided by this Court, and the decision in this case by the Court below, which has the effect of a holding that the employer must keep his plant open for further stoppages, should be set aside. The better rule has since been promulgated by the Board:

> "Nothing in the Act, in our opinion, requires that an employer continue to operate his plant despite the prospect of recurrent work stoppage which would make further operations uneconomical." (*International Shoe Co.,* 93 N.L.R.B. No. 159, March 26, 1951.)

Likewise, in the recent decision in *Morand Brothers Beverage Co.* v. *N.L.R.B., supra,* the Seventh Circuit Court of Appeals held that a union strike against one member of an employer association after contract negotiations with the association had deadlocked was a protected concerted activity under the amended Act. Nevertheless, the Court held that the other members of the association were not stripped of retaliatory measures by the amended Act:

". . . they had a right to counter the strike's effectiveness by laying off, suspending or locking out their salesmen, who were members of the striking Union, and as to whom there was not then in effect any collective bargaining agreement. We so hold, not merely on the basis of the implied recognition in the 1947 Amendment to the Act, Section 8 (d) (4), of the existence of such a right, but because the lockout should be recognized for what it actually is, i.e., the employer's means of exerting economic pressure on the union, a corollary of the union's right to strike." (190 F. (2d) 576, 582.)

Our case is analogous to *C. G. Conn Ltd.* v. *N.L.R.B.* (C.A. 7, 1939), 108 F. (2d) 390, 397, which held that an employer had the right to discharge employees who concertedly and without warning refused to work overtime but did work during regular hours, in the sense that, if employees acting in concert work at times and abstain from work at other times, the employer may refuse to have them work at all.

Even assuming that the discharge of the three ringleaders was an unfair labor practice and that it became an issue in the labor dispute, we would have a case of a strike for mixed purposes—to remedy an unfair labor practice and to accomplish economic demands. Whether in such a case the employer has the right to replace the strikers is a question not answered by *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, or by any other decisions of this Court, but it is submitted that it should be decided by this Court.

VI.

The decision of the Court below, in holding that findings of the Board (*a*) that Beal, Giannelli, Johnson, Tardie and Wayert were discriminatorily discharged; (*b*) that the third amended charge was mailed by ordinary mail on August 18, 1947; and (*c*) that all 106 of the named individuals made application for reinstatement, are supported by substantial evidence on the record considered as a whole, represents a gross misapplication of the standard prescribed by this Court in *Universal Camera* v. *N.L.R.B.*, 340 U.S. 474. In that case this Court said that it would intervene in cases in which that standard was misconstrued or grossly misapplied and it is submitted that this is such a case.

(*a*) The finding that Beal, Giannelli, Johnson, Tardie and Wayert were discriminatorily discharged. As to these five the Trial Examiner found that they

> "did not give testimony. For them neither employee record cards nor employment termination slips are in evidence. Beal was discharged as of September 20; the other four as of September 21. The undersigned finds it a justified inference that these five employees were discharged because of participation in concerted activities September 21, 1946." (T. 239.)

In the case of other employees discharged for such participation record cards were put in evidence frankly showing that as the reason—petitioner considered such participation to be good cause for discharge and made no effort at concealment or suppression. Furthermore, in a plant employing 6000 to 14,000 employees the discharge of these five people on two days (the day of and the day preceding the concerted activity) would not warrant an

inference that the events are related. The case is submitted to be one of complete lack of evidence of discrimination, of a finding based solely on unwarranted inference, and a proper case for intervention by this Court. At no time has either the Board in its briefs, or the Court in its opinions, contradicted, dealt with, discussed or even mentioned the petitioner's specific contention that the finding as to these five discharges is not supported by substantial evidence on the whole record.

(*b*) The Court below affirmed the Board's finding that the third amended charge, on which the Board's complaint was based, was served on petitioner by ordinary mail on August 18, 1947, a date prior to the effective date of the amended Act (T. 377). The finding rests solely on the affidavit of Dorothy M. Fryder (T. 135), which was incorporated into the record as proof of the service of the third amended charge on petitioner on August 18, 1947, by an order of the Board (T. 142). Close scrutiny of this affidavit, it is submitted, reveals that nothing therein contained warranted a finding either that the third amended charge was mailed to petitioner by ordinary mail on August 18, 1947, or that petitioner received a copy of the third amended charge at any time prior to April 6, 1948, when the Board issued and served its complaint on petitioner by registered mail, together with a copy of the third amended charge.

"Service" within the meaning of Section 11 (4) of the Act and the Board's Rules and Regulations, *supra*, is not complete until the process or paper served is actually received by the party entitled to service. "It is the receipt . . . which constitutes service." *N.L.R.B.* v. *Friedman-Harry Marks Clothing Co.* (C.A. 2), 83 F. (2d) 731, 733.

The rule as to the character and sufficiency of proof of mailing is stated as follows in *United States, ex rel. Hel-*

mecke, v. *Rice* (D.C. S.D. Texas), 281 Fed. 326, 331, and approved by the Court below in *United States* v. *Barnette* (C.A. 5), 91 F. (2d) 10, 11:

> ". . . the fact of mailing, where that fact is an important one, must be proven, like any other fact, by direct or circumstantial evidence, and that, where there is no direct evidence of mailing, it is not sufficient proof of mailing to offer testimony merely that the general custom of an office was to mail all letters and notices. The better rule, and that which seems to be established by the weight of authority, is that in the absence of direct evidence there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle, and in addition there must be testimony of the employee, whose duty it was to deposit the mail in the post office, that he either actually deposited that mail in the post office, or that it was his invariable custom to deposit every letter left in the usual receptacle, and that he never failed in carrying out that custom."

Measured by this rule, the Tryder affidavit is on its face insufficient proof of the mailing of the third amended charge to petitioner on August 18, 1947.

Nothing in the affidavit lists among Tryder's duties the actual deposit for mailing of letters prepared by Tryder. Nothing in the affidavit sets forth any custom of placing letters in a certain receptacle for mailing. The fifth paragraph of the affidavit, dealing with the question of actual mailing, states in substance and *in the third person* that the letter of August 18, 1947, was "placed with the outgoing mail for that day and duly deposited in the United

States mail." Other recitals in the affidavit were, by significant contrast, *in the first person.* There is no statement that Tryder herself placed the letter in the outgoing mail or deposited it in the United States mail, or that it was Tryder's duty to do so, or that Tryder saw anybody do so. Accordingly, the recitals in the fifth paragraph are not, under the rule stated above, competent evidence of the fact of mailing of a copy of the third amended charge to petitioner on August 18, 1947.

(*c*) The finding (T. 149) that one hundred and six named individuals had applied for reinstatement is made without direct evidence as to eighty-five of them. There was testimony that a group of strikers, variously estimated to consist of two hundred to over four hundred (App. to Respondent's Brief, pp. 98, 78) people, assembled on the sidewalk outside the personnel office for the purpose of making application for reinstatement at about 8 a.m. on October 21, 1946 (T. 232).

Of this group, only twenty-one testified at the hearing and only two of them testified that they were interviewed by the petitioner on October 21, 1946, and were notified that there was no work available for them. There is no evidence that any of the other nineteen testified that he had notified the petitioner of his unconditional willingness to return to work.

More important, however, is the fact that *none* of the other eighty-five named in the decree was specifically identified in any way as having been among the group that had assembled at the plant. The nature of the evidence relied upon by the Trial Examiner, the Board and the Court below is submitted to be too sweeping and general to be adequate for this purpose. The evidence consisted mainly of an estimate by an official of petitioner that about two hundred fifty strikers were there and general employee

statements of the following character: Employee Morton testified: "We all went back to Winchester's personnel Monday morning." Employee Conte stated: "We all went up to the front of personnel." Another employee, Los, testified: "Well, all the guys were down there, a long line of them." Raffone, another employee, stated: "We all had made plans to go meet and go there as a body. We did." Employee Wilson testified: "Well we all assembled out in front of the office that day." Employee Muir stated: "Well, all the fellows were up at personnel" (footnote 4, p. 11 of the Court's opinion, T. 3~~4~~8).

This testimony was plainly not intended, even by the Board counsel, to be taken literally as evidence that each and every one of the strikers was in the group. This is apparent from his intention to have each of the individuals involved take the stand, and this offer and its rejection by the Trial Examiner are plainly not a substitute for evidence against the petitioner as the Court seemed to feel (see footnote 5, p. 12 of the Court's opinion, T. 3~~4~~8).

Even as to the small group that testified, it was not literally true that each had been in that group outside the personnel office. One of them, Alex Milner, admitted he had never made an effort to return to work for the petitioner, having found suitable employment elsewhere about a week after the strike started, *i.e.*, about September 30, 1946 (Board Transcript of Testimony, 2683, 2713; T. 380).

Certainly such evidence could not suffice to establish the presence of any specified one or more of these eighty-five individuals in the assembled group for the purpose, *e.g.*, of proving participation by the individual in a wrongful act of any kind committed by the assembled group.

See, *e.g.*, *Matter of Local No. 1150, U.E.—C.I.O. (Cory Corp.)*, 84 N.L.R.B. 972, 973, footnote 5.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

Statutes Involved.

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Sec. 151 *et seq.*):

"Sec. 9. . . .

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, . . .

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

"SEC. 10. . . .

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in

which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

. . . . . .

"(e) . . . If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript . . ."

"SEC. 11. . . .

"(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified

return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. . . ."

Administrative Procedure Act (60 Stat. 237, 5 U.S.C. Sec. 1001 *et seq.*):

"SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .

"(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted . . ."

. . . . . .

"SEC. 6. Except as otherwise provided in this Act— . . .

"(b) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. . . ."

. . . . . .

"SEC. 10. . . .

"(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 586

OLIN INDUSTRIES, INC., WINCHESTER REPEATING ARMS COMPANY DIVISION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The original opinion of the court below (R. 340-349) is reported at 191 F. 2d 613 and the opinion denying rehearing (R. 379-381) at 192 F. 2d 799. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 143-159, 160-314), are reported at 86 NLRB 203.

JURISDICTION

The judgment of the court below was entered on August 7, 1951 (R. 349). Petition for rehearing was denied on November 30, 1951 (R. 381), and application for leave to file a second petition for rehearing and to adduce additional evidence was denied on January 14, 1952 (R. 403). The petition for a writ of certiorari was filed on February 14, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the original National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151 *et seq.*), and of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 151, *et seq.*), are set forth in the Appendix, *infra,* pp. 23-30.

QUESTIONS PRESENTED

1. The first question posed by the petition—whether the charges were filed by a person acting as a "front" for a union not itself authorized to file—is not properly presented here.[1]

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[1] This matter was never put in issue before the court below; it was mentioned for the first time in petitioner's unsuccessful application for leave to file a second petition for rehearing. Assuming that the question is properly raised here, it goes only to a matter of substantial evidence. See pp. 13-14, *infra.*

2. Whether substantial evidence supports the Board's findings that petitioner, in violation of Section 8 (3) and (1) of the original Act, locked out, discharged, and refused to reinstate various employees in reprisal for their engaging in concerted activities protected by the Act.

3. Whether the Board's procedure was valid and proper.

a. Whether the Board, more than six months after the effective date of the amended Act, could properly issue a complaint based upon charges filed and served by ordinary mail before the effective date of that Act.

b. Whether such a complaint, which alleged that 85 named strikers had been denied reinstatement, could properly be amended at the hearing to add to the list of those denied reinstatement two more who participated in the mass application for reinstatement but were not named in the charge.

c. Whether the Board could properly find that petitioner illegally locked out its employees where the lock-out, although not alleged in the complaint, was an integral part of the course of unfair labor practices therein alleged, and where the facts relating to the lock-out were fully litigated at the hearing.

STATEMENT

A. The unfair labor practices as found by the Board

Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on September 29, 1949, issued its findings of fact, conclusions of law, and order. The pertinent facts, as found by the Board, may be summarized as follows:

In April 1946,[2] petitioner instituted changes in the working hours and overtime pay of its rolling mill employees, who protested without success (R. 204, 206-207; B. A. 121-128, 143-146, 160-163).[3] Apparently believing that the Union[4] was responsible for the employees' discontent, petitioner began a campaign to intimidate the employees by threatening discharge if they should join the Union or engage in a strike and by interrogating them regarding union activities (R. 261-276; B. A. 75-76, 85-87, 105-106, 118, 190-191, 195, 205-206, 223-228, 296-299, 304-305). About September 20, 1946, employees of all three shifts of the rolling mill met and formulated demands to be presented

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[2] In 1942, petitioner discharged three employees. Petitioner has not requested this Court to review the findings of the Board and the court below that these discharges were unlawful.

[3] The symbol "R" refers to the transcript of record; the symbol "B.A." refers to the appendix to the brief filed by the Board in the court below.

[4] United Electrical, Radio & Machine Workers of America, CIO.

to petitioner through committees appointed to represent each shift. The employees resolved to hold a 15 minute work stoppage the following day on each of the three shifts, immediately following their respective 15 minute lunch periods, at which time each committee was to present written grievances to petitioner (R. 211-213; B. A. 7-8, 56-58, 131-134, 148-150).

In accordance with this plan, the first shift employees, with the exception of the few workers required to continue working to prevent damage, did not immediately return to work when their lunch period ended at 12:15 p. m. on Saturday, September 21, 1946, but instead assembled in the washroom. Works Manager Boak, however, refused to accept or discuss the written grievances which the first shift committeemen, Destadio, Fred Baldino, and Bonito, attempted to present, and ordered all the employees back to work. The plant guards were called but no violence ensued, and a few minutes later, at the suggestion of Destadio, the men resumed their work (R. 213-216; B. A. 134-136, 140-141, 152-154, 252-253). Several hours later, Destadio, Baldino and Bonito were summoned to Manager Boak's office and summarily discharged on the ground that they had instigated the work stoppage which Boak characterized as an illegal strike (R. 217-220; B. A. 138-140, 155-157).

On learning of the three discharges, the second shift employees decided to request reinstatement

of the three discharged employees in addition to presenting their other grievances (R. 220; B. A. 61-62). As in the case of the first shift, the employees on the second shift did not return to work at the end of their lunch period at 7:15 p.m., and attempted to present their grievances to Manager Boak, who refused to accept them, ordered the men back to work, and again called for the guards. The men then retired to the washroom (R. 221-222; B. A. 62, 65-66, 91-92, 164-167). Boak later called Proto, Weaver and Morton, three of the committeemen for the second shift, to his office, but they refused to go, fearing discharge. He then sought to ascertain the names of the employees who had engaged in the work stoppage (R. 222; B. A. 67-68, 93, 167). At about 9:30 p.m., the men were ordered to leave the plant because the mill was to be shut down. The men, however, refused to leave prior to the end of their shift at 11:00 p.m., because they had been advised earlier in the week by company officials that anyone who failed to work on Saturday or Sunday would be discharged (R. 223; B. A. 68-70, 81-83, 167-168, 228-229). They remained in the washroom and performed no work until the end of their shift, when they left the plant without disturbance (R. 223-224; B. A. 70-71, 95-96, 168).

When the employees on the third shift reported for work at 11:00 p.m., they found that the usual number of plant guards at the gates had been in-

creased, that the rolling mill had been shut down, and that they were not permitted to enter. Limited operation of the rolling mill was resumed the following day, September 22, but only a few employees selected by company officials were admitted to work, and they were given new passes to distinguish them from the other employees (R. 225-226; B. A. 71-73, 83-84, 170-171, 210-211, 247-249, 251-252, 255-256, 518). Those who were locked out thereupon staged a parade and began to picket the plant (R. 231; B. A. 74, 157-158).

On September 24, 1946, petitioner sent letters inviting the strikers to return to work. Such letters, however, were not sent to Destadio, Fred Baldino, Bonito, or to eight employees who, with one exception, were members of the three shift committees (R. 12, 229-230; B. A. 57-58, 141, 149-150, 175, 184, 214, 229, 286, 311, 519-520). Two of the eight, Louis Baldino and Ballard, had not participated in the work stoppage.[5] Petitioner discharged the eight employees together with five others,[6] and admitted at the hearing that membership on the shift committees might "very possibly" have been the cause for the discharge of the committeemen (R. 237-239; B. A. 501-502, 522-525, 534). On Sep-

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[5] Baldino was on the third shift which was locked out (B. A. 209), and Ballard, on the second shift, had remained on duty in order to prevent damage to machinery (B. A. 91-92, 282, 285).

[6] The five were Beal, Giannelli, Johnson, Tardie, and Wayert.

tember 27, 1946, at a meeting between representatives of petitioner, the Union and the rolling mill employees, attended by federal and state mediators, petitioner offered to reinstate the employees except Destadio, Fred Baldino and Bonito, but the Union refused to accept this condition (R. 231-232; B. A. 10-11, 177-178, 211-214, 414-415).

On October 20, 1946, the unfair labor practice strikers who had not abandoned the strike decided to withdraw their picket lines and to apply for reinstatement the following day (R. 232; B. A. 77-78, 182). Accordingly, no picketing took place on October 21, and all the strikers assembled at petitioner's personnel office early that morning ready and willing to return to work (R. 232; B. A. 13-14, 78, 113, 172-173, 182, 201, 233-234, 288, 307, 314, 328-329, 390, 402, 486-487). Petitioner, however, rehired only between 75 and 100 employees and treated them as new, rather than reinstated, employees (R. 232-233, 244; B. A. 291-294, 350-351, 487-488). The remaining applicants, after waiting two days in line for reinstatement, concluded that their applications were unsuccessful and left to resume picketing (R. 233; B. A. 16-17, 201-203, 215-216).

Upon these facts the Board found that petitioner, in violation of Section 8 (1) of the Act, interfered with, restrained and coerced its employees (R. 151-152, 283-284), and that petitioner, in violation of Section 8 (3) and (1) of the Act, discrimi-

natorily discharged 16 employees (R. 147, 249-250, 253-254, 256-257, 284-285), locked out 78 other employees from September 21 to 29, 1946 (R. 148, 228, 254, 256-257), and refused to reinstate the 78 and 9 other employees upon their application for reinstatement on October 21, 1946 (R. 149, 254-256, 258). The Board accordingly ordered petitioner to cease and desist from the unfair labor practices found and to reinstate with back pay the employees who were unlawfully discriminated against (R. 153-159).

B. Proceedings before the Board

1. The procedural steps

In 1946, prior to the enactment of the amended Act, charges respecting the discharges of Mumford, Bucci and Gordon, employees as to whom petitioner seeks no review,[7] were executed by the Union and filed by Marvin C. Gold, an attorney-at-law representing these three employees (B. A. 435-439). Sometime after June 1946, the Union executed and filed amended charges which repeated the allegations of the original charges and also complained of petitioner's 1946 unfair labor practices, described above (R. 169-170; B. A. 439-440). In July 1947, however, the Union requested permission to withdraw the charges (R. 170; B. A. 440). Gold, who was not attorney for the Union and was never retained by it, opposed the Union's

[7] See note 2, *supra*.

withdrawal of the charges and, at his request, the dismissal of the charges was made without prejudice (R. 170; B. A. 437, 441, 452-453). Thereafter, beginning on July 30, 1947, Gold executed and filed a series of charges, culminating with the third amended charge filed on August 18, 1947, which alleged the 1946 violations discussed above (R. 23, 26, 30, 35).[8] Copies of these charges were served on petitioner by ordinary mail on August 18, 1947, four days before the effective date of the amended Act (R. 144-145, 161; 134-142).[9]

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[8] In its exceptions to the trial examiner's report petitioner urged as error the trial examiner's failure to dismiss the complaint on the ground that Gold was a "front" for the Union. Petitioner there alleged that it was at the Union's instigation that Gold sought and obtained from the employees authorization to represent them as individuals, and that Gold's interest in the charges was "purely monetary" (R. 99-100). Following the Board's rejection of this exception petitioner abandoned its claim that Gold was a "front" for the Union, and only sought to resurrect it in its application for leave to file a second petition for rehearing in the court below (R. 388).

[9] At the commencement of the hearing before the trial examiner, petitioner objected to the introduction of the charges into the record, insisting that it had never been served with such charges. Counsel for the General Counsel thereupon showed petitioner's counsel carbon copies of letters transmitting the charges (R. 160). Counsel for the General Counsel apparently understood that petitioner's counsel had tacitly admitted service of the charges and accordingly did not seek to introduce further proof of service into the record (R. 81).

In its exceptions to the intermediate report, however, petitioner contended that it was not served with copies of the charges until service of the complaint on April 8, 1948. Ac-

The complaint, issued April 8, 1948, alleged *inter alia* a refusal to reinstate 85 named unfair labor practice strikers who participated in the unsuccessful mass application for reinstatement (R. 161, 163, 39; B. A. 4-7). At the commencement of the hearing before the trial examiner, the complaint was amended over petitioner's objection so as to add two more names to the list of 85 (R. 163; B. A. 3-4).

2. The Board's rejection of petitioner's procedural objections

The Board rejected petitioner's contention that Gold, the charging party, was acting not on behalf of the individual discriminatees, but as a "front" for a union which had not complied with the affidavit-filing requirements of Section 9 (h) (R. 143-144, n. 2). See note 1, p. 2, *supra*. The Board also held, upon the facts set forth above, that the charges were filed and served prior to the effective

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cordingly, counsel for the General Counsel "in the interest of clarifying any possible ambiguity with respect to fulfillment of the procedural administrative requirements of the Act," moved to reopen the record for introduction therein of proof of service of the charges (R. 79-81). On March 16, 1949, the Board served upon petitioner a Notice to Show Cause, together with copies of the aforesaid letters and an affidavit that they were mailed to petitioner, on and before August 18, 1947. The Notice to Show Cause stated that unless sufficient cause to the contrary was shown by March 28, 1949, the aforesaid proof of service of the charges would be made a part of the record (R. 134-141). Petitioner filed no response to this Notice, and on April 11, 1949, the Board issued its order incorporating such proof of service into the record (R. 142).

date of the amended Act, and that the complaint was therefore not barred by the time limitation which Section 10 (b) of the amended Act imposed on the filing and service of charges (R. 144-145, 162-163). The Board upheld the action of the trial examiner in permitting the amendment of the complaint at the hearing to add two discriminatees, similarly situated to the 85 already named as having been denied reinstatement (R. 144, n. 3, 163). Finally, the Board upheld the trial examiner's finding of an illegal lockout, over petitioner's objection that no lockout was alleged in the charges or complaint. The Board noted, "The issues with respect to the lockout were fully litigated at the hearing, and an opportunity was afforded the [Company] to adduce testimony to refute the charge that it locked out the employees in question" (R. 148, n. 10).

C. The decision of the court below

The Court of Appeals for the Fifth Circuit held that the evidence on the record considered as a whole sustained the findings of the Board (R. 345). The court held further that since the charges were filed and served prior to the effective date of the amended Act, they were not subject to the limitation period therein provided (R. 346). Upon application for rehearing the court in a further opinion rejected the Company's contention that the charges were defective because served by ordinary, rather than by registered, mail (R. 379-380). The

court did not pass upon the question whether Gold, the charging party, was a "front" for the non-complying union, as this issue was not presented below until the application for leave to file a second petition for rehearing, which was denied (R. 387-388, 403).

ARGUMENT

1. Since petitioner abandoned before the court below its contention that on the factual allegations referred to in petitioner's exceptions (R. 99-100) Gold should have been found by the Board to have been acting as a "front" for a non-complying union, that question is not appropriate for consideration here. *McCullough* v. *Kammerer Corp.*, 323 U. S. 327, 328. In any event, petitioner's own allegation that Gold solicited and obtained the authorization of the individual employees shows that Gold became their agent, and not the agent of the Union. That Gold may have undertaken to represent the employees at the instance of the Union is immaterial; petitioner itself alleged that "Gold made dealings with these individuals as to his fee based upon what they might ultimately recover in back-pay awards * * * [and] his interest in the proceedings was purely monetary" (R. 99-100). It is settled that circumstances such as these do not warrant an inference of "fronting." *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 443 (C. A. 3), certiorari denied, 342 U. S. 868; *National Labor Relations Board* v. *Augusta Chemical Co.*, 187 F. 2d 63, 64 (C. A. 5); *Southern Fur-*

niture Mfg. Co. v. *National Labor Relations Board,* 29 LRRM 2392, 2393 (C. A. 5, January 31, 1952); *National Labor Relations Board* v. *Alside, Inc.,* 192 F. 2d 678, 679 (C. A. 6).

Petitioner's claim of conflict with the *Alside* decision, *supra,* is without substance; that case turned on its own facts—the charge was filed by a union president, on behalf of all union members, under circumstances which led the court to find that he was acting in his capacity as president of the union. See *Southern Furniture Co., supra,* distinguishing the *Alside* decision on factual grounds. Since petitioner's allegations do not warrant an inference that Gold was "fronting" there is no basis for petitioner's assertion that its contention poses any "jurisdictional" issue. Cf. Brief for the National Labor Relations Board in Opposition, pp. 10-13, *Red Rock Co.* v. *National Labor Relations Board,* No. 695, October Term, 1950, certiorari denied, 341 U. S. 950; *Ann Arbor Press, Inc.* v. *National Labor Relations Board,* No. 260, this Term, certiorari denied, 342 U. S. 859. Petitioner's failure to preserve its objection in the court below thus precludes its consideration by this Court.

2. The other questions of fact raised by the petition (Pet., p. 4) are peculiar to the record in this case, and consequently do not warrant review by this Court. *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175-178. Moreover, the findings of the trial examiner and the Board, approved by the

court below, are amply supported by the record.[10]

3. The question whether the employees engaged in misconduct which would have justified their discharge, lockout, or non-reinstatement need not be reached on this record which supports the Board's finding, affirmed by the court below (R. 253, 345), that petitioner's reprisals were in fact motivated by its anti-union animus rather than by any alleged illegal conduct of the employees.[11] In any event, as both the Board and the court below properly held, the employees' conduct was not illegal (R. 148, 252-253, 346).

The holding that the employees who prolonged their meal period 15 minutes for the purpose of presenting grievances to their employer were engaged in protected concerted activity is clearly cor-

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[10] With respect to the mailing of the charge, see R. 135-142, 144-145, 379. With respect to the applications for reinstatement, see R. 149, 232, 255, 345, 348-349, 380-381; B. A. 77-78, 113, 173, 182, 201, 233-234, 288, 307, 314, 328-329, 390, 402, 486-487.

[11] See, for example, the cases of Louis Baldino and Ballard, who were discharged although neither participated in the allegedly illegal work stoppage (see note 5, *supra*). Compare the admission of Superintendent Willers that *membership* on the shift committees might have been cause for the discharge of the committeemen (p. 7, *supra*). Also significant in this context is the fact that of the several hundred employees who participated in the allegedly illegal action, petitioner discharged only the union members and others who presented the grievances. Cf. *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. 2d 61, 67-68 (C. A. 2), affirmed, 309 U. S. 629.

rect and accords with the holdings of other Courts of Appeals. *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 819 (C. A. 3); *National Labor Relations Board* v. *National New York Packing & Shipping Co.*, 86 F. 2d 98 (C. A. 2), enforcing, per curiam, 1 NLRB 1009; *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499, 501-502 (C. A. 5), reversed on another point, 340 U. S. 361. No conflict of decisions exists and, on this point, none is claimed.

Similarly, the somewhat longer, but equally peaceful and orderly, cessation of work by the employees on the second shift, occasioned in part by petitioner's unfair labor practice in discharging the committeemen from the first shift, and in part by the employees' belief that they were required to stay in the plant until the end of their scheduled shift (p. 6, *supra*), was properly held by the court below not to warrant denial to them of the protection of the Act. *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. 2d 61, 68 (C. A. 2), affirmed, 309 U. S. 629; cf. *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 816 (C. A. 7). This Court's decisions in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, and *International Union, U. A. W.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, relied on by petitioner, are inapposite, for this case involves neither a seizure of the plant and violent resistance to police

authorities attempting to compel obedience to an injunction (as in *Fansteel*), nor the adoption of a "quickie-strike" technique resulting in 26 work stoppages in which no demands were presented and which were designed to harass the employer and disable him "from making any dependable production plans or delivery commitments" (*Wisconsin* case, 336 U. S., at 249). On the contrary, the *Wisconsin* opinion supports the judgment below in this case, for the employees here sought to present specific grievances, and the work stoppage was "isolated," reflected a "temporary rebellion over rules or conditions of work," and took place "in a context of anti-union animus on the employer's part" (336 U. S., at 255-256).[12]

4. None of petitioner's contentions directed to the timeliness or sufficiency of the charge and com-

[12] Petitioner's lockout of its employees in retaliation for their attempt to present grievances plainly constituted "interference, restraint, and coercion," in violation of Section 8 (1) and discrimination in violation of Section 8 (3). Indeed, before the Board, petitioner made no attempt to defend the legality of the lockout, but argued solely that the charge and complaint failed to allege it (see *infra*, p. 21). Its belated reliance here on *C. G. Conn. Ltd.* v. *National Labor Relations Board*, 108 F. 2d 390, 397 (C. A. 7), and *Morand Brothers Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 582 (C. A. 7), is misplaced. The instant case presents no attempt by the employees to dictate the hours at which they would work as in *Conn.* In *Morand* the court made it clear that a lockout was not a legitimate weapon when undertaken in reprisal or as a penalty for the exercise of rights protected by the Act (190 F. 2d, at 584).

plaint in this case presents any conflict of decisions or any important question warranting review.

a. Since the charges were filed and served prior to the effective date of the amended Act, they were not subject to the limitations period which Section 10 (b) of the amended Act placed upon the filing and serving of charges.[13] Contrary to petitioner's contention, *Superior Engraving Co.* v. *National Labor Relations Board,* 183 F. 2d 783 (C. A. 7), certiorari denied, 340 U. S. 930, does not conflict with the settled law on this point; it stands only for the proposition that "stale" charges not filed and served before the enactment of the amended Act must be filed prior to its effective date, rather than (as other courts have held) within six months thereafter. 183 F. 2d, at 789-790, esp. n. 2. Since the charges here were filed and served on August 18, 1947, four days prior to the effective date of the amended Act, the issue as to which the *Superior* case conflicts with the view of other courts is not presented on this record.

b. As noted above, pp. 14-15, n. 10, petitioner's attempt to show that the charges were not served raises only an evidentiary question, which does not warrant review, and which in any event was prop-

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[13] The complaint issued under the amended Act, but the limitations period in that Act applies to the charge, not to the complaint. Section 10 (b). Congress rejected an amendment which would have limited the period in which a complaint could be issued. H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 53.

erly decided adversely to petitioner. Petitioner's argument that the charges were served by ordinary, rather than by registered, mail was properly dismissed by the court below as raising "a mere technical defect in the service of a charge which is not a pleading" (R. 379).[14] As the court noted, quoting with approval from *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, 1013 (C. A. 7), certiorari denied, 342 U. S. 815:

> . . . the Company * * * was [not] in any way misled or prejudiced by this procedure. * * * the error was harmless. It did not affect the substantial rights of the Company * * * and should therefore be disregarded.

Since petitioner entered an answer on the merits without attacking the manner of service, it waived its right to object thereto. *Harlan* v. *Sparks,* 125 F. 2d 502, 506 (C. A. 10); *Jackson* v. *Heiser,* 111 F. 2d 310, 313 (C. A. 9); see *Munter* v. *Weil Corset Co.,* 261 U. S. 276, 279. Moreover, the record leaves

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[14] Such a defect is not comparable to a failure by the agency to make necessary findings required by statute as a condition precedent to its action, as in *Mahler* v. *Eby,* 264 U. S. 32, and *Wichita Railroad & Light Co.* v. *Public Utilities Commission of Kansas,* 260 U. S. 48, relied on by petitioner (Pet. 14). In *Wise* v. *Herzog,* 114 F. 2d 486 (C. A. D. C.), which involved an action *in personam* in the Small Claims Court, the record failed to show any service of process on the defendant or her agent, whether by registered mail or otherwise, or that notice of process came to the attention of the defendant within a reasonable time after delivery and before the return day.

no room for doubt that petitioner had ample notice of the violations charged and fully litigated them.

c. The amendment of the complaint at the hearing to expand the list of alleged discriminatees from 85 to 87 was in accord with the practice expressly approved by this Court under the original Act in *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 224-225. The transaction complained of—petitioner's refusal to reinstate unfair labor practice strikers upon their mass application—affected the entire group of 87. That two were inadvertently omitted from the charge could not, under these circumstances, preclude the Board, following its administrative investigation, from amending the complaint at the opening of the hearing to reflect the full consequences of petitioner's illegal action. The amended Act expressly preserved the Board's right to amend the complaint "at any time prior to the issuance of an order based thereon." Section 10 (b). The Board may elaborate in the original complaint, and *a fortiori,* in the amended complaint, the violations alleged in the charge. *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. 2d 38, 42-43 (C. A. 6); cf. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 368-369; *National Labor Relations Board* v. *Indiana & Michigan Electric Co.,* 318 U. S. 9, 18.[15]

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[15] For similar holdings under the amended Act, see *National Labor Relations Board* v. *Kobritz,* 193 F. 2d 8, 14-16 (C. A.

d. Petitioner's contention that the Board's finding of an illegal lockout is not supported by allegations in the charge or the complaint is virtually identical to that rejected as "highly technical" by this Court in *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 349-351. Since the lockout grew out of and was part of the same pattern of events which formed the basis of the charge and the complaint (*supra*, pp. 6-7), and since, as the Board found (R. 148), the illegality of the lockout was fully litigated at the hearing, petitioner was clearly not prejudiced. See R. 225-226; B. A. 179-181, 193-201. Cf. *National Labor Relations Board* v. *Sunbeam Electric Mfg. Co.*, 133 F. 2d 856, 858 (C. A. 7).[16]

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1); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 903-904 (C. A. 3); *National Labor Relations Board* v. *Kingston Cake Co.*, 191 F. 2d 563, 567 (C. A. 3); *National Labor Relations Board* v. *Westex Boot & Shoe Co.*, 190 F. 2d 12, 13-14 (C. A. 5); *Cathey Lumber Co.* v. *National Labor Relations Board*, 185 F. 2d 102 (C. A. 5); enforcing 86 NLRB 157, 162, vacated on other grounds, 189 F. 2d 428; *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C. A. 7); *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413, 415 (C. A. 10). The dictum in the *Superior Engraving* case, *supra*, relied on by petitioner (p. 10), concerned an amended complaint which added a new and totally unrelated unfair labor practice based upon an untimely charge.

[16] The cases cited at pp. 16-17 of the petition all involve situations where the company was not put on notice that the Board was litigating the unfair labor practice eventually found. The Board now customarily declines to find violations as to matters not alleged or litigated. *Pinkerton's Na-*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1952.

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tional Detective Agency, Inc., 90 NLRB 205, 206; *Service Trade Chauffeurs*, 85 NLRB 1037, 1039, n. 3. In *Joanna Cotton Mills* v. *National Labor Relations Board*, 176 F. 2d 749 (C. A. 4), cited by petitioner, p. 18, the court, after holding that the Board's finding was unsupported by the evidence, added as a dictum (p. 754) that the untimely amended charge "brought into the case a new and entirely different charge of unfair labor practice from that contained in the original charge," and hence was barred by limitations.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or pre-

scribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before

a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

* * * * * *

The pertinent provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), are as follows:

* * * * * *

SEC. 9. * * *

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(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that

he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice

occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may

be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence

on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect

to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 586

OLIN INDUSTRIES, INC.,
WINCHESTER REPEATING ARMS COMPANY DIVISION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petition for writ of certiorari herein was denied on April 7, 1952. This petition for rehearing is timely filed.[1]

Counsel has in this instance departed from his practice of not burdening the Court with petitions for rehearing. That departure is felt to be warranted for the following reasons. First: This case presents the important federal

[1] The time for filing was extended until May 7, 1952, by order of Mr. Justice Black, entered on April 21, 1952.

question of whether a union barred from the benefits of the National Labor Relations Act, as amended, by reason of its failure to comply with the oath and reporting provisions of that law may, nevertheless, obtain such benefits by the subterfuge of having an individual "front" for the non-complying union in the filing of charges of unfair labor practices. Since the denial of certiorari in this case, the court below has announced a decision (*N.L.R.B.* v. *Happ Brothers Co.*, C.C.A. 5th, decided April 15, 1952) on that precise question which plainly shows it to be in conflict with the Court of Appeals for the Third Circuit. Second: The National Labor Relations Board presumably will, on the basis of the conflict with the Third Circuit, obtain review of the decision of the court below in *Happ Brothers Co.* This case might appropriately be considered at the same time. As matters stand, petitioner has been denied the opportunity to prove the subterfuge of a "front" used by the noncomplying union in this case, although the court below *now* holds that such a subterfuge is not permissible. And third: The Court's original consideration of the "front" question as a ground for granting certiorari may well have been prejudiced by respondent's broad but inaccurate assertion that petitioner had abandoned the question in the court below. Primarily because of these considerations, counsel respectfully prays in behalf of petitioner that the Court grant rehearing of its order denying review and permit certiorari to issue in accordance with the petition filed February 14, 1952.

Grounds of Petition.

1. Certiorari should be granted in resolution of the conflict between the court below and the Circuit Court of Appeals for the Third Circuit on whether the oath and reporting provisions of the National Labor Relations Act, as amended, may be subverted by the subterfuge of having an individual "front" for a noncomplying union.

Here the charges upon which the National Labor Relations Board proceeded were filed by a lawyer over his own signature (R. 23; 26; 30; 35). The lawyer was not connected with petitioner. The charges, however, concerned numerous members of a non-complying union who were in petitioner's employ (R. 26-28; 30-33; 35-38). Substantially the same charges had previously been filed by the union; but withdrawn in pursuance of its policy "to have nothing to do with the Taft-Hartley Law" (R. 169-170). One witness who was included in the charges against petitioner testified that his first acquaintance with the man who filed the charges was meeting him at the union hall a week or ten days before the hearing. The charges had been filed almost a year before the hearing. The witness testified further that he had never discussed this case with the man who filed the charges. At that point, the Trial Examiner cut off further inquiry on the "front" question despite an offer by petitioner to prove the "front" for the noncomplying union if permitted to continue (Appendix to Petitioner's Brief in the court below, pp. 23-27).

Section 9(f)(h) of the Act (pp. 30-31 of our petition for certiorari) plainly provides that respondent shall make no investigation of any question raised by a noncomplying union and issue no complaint pursuant to a charge made by such a union. Nevertheless, respondent on the express statement that "it is immaterial that he [the filing individual] might be acting on behalf of the union" denied petitioner the opportunity to prove the "front" (R. 143, fn. 2). The court below declined to grant petitioner leave on the "front" question to adduce additional evidence before respondent pursuant to section 10(e) of the Act (p. 32 of our petition for certiorari). That action was without opinion (R. 403). In an earlier decision, *N.L.R.B.* v. *Augusta Chemical Co.*, 187 F. 2d 63, the court below had rejected the legal contention of the respondent there that a Board order was unenforceable because charges filed in the names of individual employees were in fact filed by a

noncomplying union in a fraudulent subterfuge; and the court had done so with the flat statement: "We are in complete disagreement with respondent's position on this point." See the *Augusta Chemical Co.* case at p. 64. In a later decision after the denial to petitioner of an opportunity to prove the "front," the court below rejected the argument of the Board in reliance on *Augusta Chemical Co.* that the whole question of "fronting" was "irrelevant" and "insignificant" and "too academic to consider"; and the court refused enforcement of a Board order based on charges filed in the name of an individual but in fact for a noncomplying union. *N.L.R.B.* v. *Happ Bros. Co.*, 29 L.R.R.M. 2699 (C.C.A. 5, April 15, 1952).

The *Happ Bros.* decision was subsequent to this Court's denial of our petition. It is in direct conflict with *N.L.R.B.* v. *Clausen*, 188 F. 2d 439 (C.C.A. 3, 1951). In *Clausen*, the Court of Appeals for the Third Circuit expressly followed the *Augusta Chemical* decision of the court below in flatly rejecting the legal contention of nonenforceability of a Board order based on charges filed in the name of individuals who were in reality representing a noncomplying union.

Presumably, respondent, on the basis of the conflict with *Clausen*, will petition for review of *Happ Bros.* and also for review of *N.L.R.B.* v. *Alside Co.*, 192 F. 2d 678 (C.C.A. 6, 1951), a decision which, like *Happ Bros.*, denied enforcement of a Board order because the charges there had been filed by an individual deemed to have acted as a "front" for a noncomplying union. The time for filing respondent's petition for certiorari has not expired in either of the *Happ Bros.* and *Alside* cases. The same question of the legal effect of a "front" in behalf of a noncomplying union is urged in a recent petition for certiorari now pending before the Court. See *Southern Furniture Mfg. Co.* v. *N.L.R.B.*, Petition for Certiorari filed April 7, 1952.

If, as appears likely, the "front" question will be reviewed by the Court in the near future, it would seem harsh to deny petitioner preservation of the opportunity to benefit from the Court's review of the question, should review go against respondent.[2]

The great importance of the question here presented hardly needs emphasis. Extremely weighty considerations of national policy sustained the validity of the Taft-Hartley Act's oath and reporting provisions. *American Communications Assn.* v. *Douds,* 339 U.S. 382. Those provisions are thought to be enforceable. *N.L.R.B.* v. *Highland Park Mfg. Co.,* 341 U.S. 322. Yet they are a joke if the sham of a "front" avoids them. And underlying all is a consideration, perhaps even greater,—continuation of the present uncertain state of the law in the various circuits on the "front" question permits continuation of the policy of the respondent, an executive agency of the Government, to treat the "front" question as "irrelevant, insignificant, and too academic to consider" (See *N.L.R.B.* v. *Happ Bros. Co., supra*), despite a rather plain congressional enactment and this Court's decisions in *Douds* and *Highland Park.*

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[2] Respondent stated in its Brief in Opposition that petitioner had "abandoned" the "front" point (Brief in Opposition, p. 13). Although respondent's statement is somewhat ambiguous, we do not understand that any express abandonment is claimed. In any event, there was none. The point was urged upon, and expressly rejected by the Trial Examiner and the Board. In view of the *Augusta Chemical* decision, the point was not urged on the court below at original hearing. However, the point was urged upon the court below with strong reliance on the intervening *Alside* case in petitioner's application for leave to adduce additional evidence on the point. That application was rejected (R. 403). Presentation to Board and Court of Appeals would suffice to preserve a point of lesser importance. All the more so here; for the "front" question goes "to the foundation of the action" (*Gila Valley, Globe & Northern Railway Co.* v. *Hall,* 232 U. S. 94, 98), "to the existence of the power on which the proceeding rests" (*Mahler* v. *Eby,* 264 U. S. 32, 45), to the power of respondent to issue any order at all. The question here is jurisdictional. *N.L.R.B.* v. *Happ Bros. Co., supra.*

2. Certiorari should be granted to resolve the federal question of general importance here presented—whether the respondent can at any time now or in the future issue a complaint with respect to an unfair labor practice alleged to have occurred years ago, provided only that the charge of unfair labor practice be filed with respondent prior to the effective date of the Taft-Hartley Law (August 22, 1947).

The charges here were filed more than six months after the alleged violations, indeed in substantial part some five years later. The complaint was issued after the effective date of the Taft-Hartley Law. So much is certain and not in dispute.[3]

Section 10(b) of the Act, as amended by the Taft-Hartley Law (See p. 31 of our petition for certiorari), expressly defines respondent's "power to issue" complaints, and in doing so expressly provides: "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . .". In this proceeding, the complaint was issued after the effective date of section 10(b), as amended, and was based on charges filed more than six months after the alleged unfair labor practices. Such a complaint was literally and plainly barred by section 10(b).

But the respondent, the court below, and other circuit courts of appeal read the statutory language "no complaint shall issue" as imposing only a statute of limitation upon the filing of charges. On that basis the Fourth and Fifth Circuits[4] say that a complaint may issue at any time after the effective date of section 10(b) based on a *charge filed within six months of such effective date*, no matter

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[3] Alleged violations occurred in 1942 and in October, 1946; charge was filed July 30, 1947, and amended August 4, 6, and 18, 1947, (R. 24-38); complaint issued April 8, 1948 (R. 43), and was amended at the hearing (R. 163).

[4] *Joanna Cotton Mills* v. *N.L.R.B.*, 176 F. 2d 749 (C.C.A. 4, 1949); *N.L.R.B.* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504 (C.C.A. 5, 1950).

how long before the charge the alleged violations occurred; and the Seventh Circuit[5] says, in a minor variation, that a complaint may issue at any time after the effective date of section 10(b) based on a *charge filed up to such effective date*, no matter how long before the charge the alleged violations occurred.

The variation between the Seventh Circuit and the Fourth and Fifth Circuits is, in our view, upon a false issue. The real issue is the issue squarely presented in this case—whether section 10(b) describes the kind of complaint that may not be issued after the effective date of that section, namely, a complaint based upon charges filed more than six months after the occurrence of the violations charged. The court below in deciding that real issue against petitioner, and the Fourth and Seventh Circuits in pretermitting that issue, with all deference to those courts, are rather clearly wrong. Note in this connection that the only exception in section 10(b) to the prohibition "no complaint shall issue" etc. is an inapplicable one in favor of a complainant in the armed forces; and observe that sections 102, 103, and 104 of the Act which collect all the postponements of the effectiveness of various provisions in the Act provide no such postponement for section 10(b) as respondent claims. And it is no answer to our view of section 10(b) to offer the charming irrelevance (See Brief in Opposition, p. 18, fn. 13) that Congress did not adopt a provision requiring complaints to be issued within six months after filing of charges. Congress did adopt a provision, section 10(b), requiring complaints to be based on charges filed within six months of the occurrence of the violations charged.

In view of the trend of the decisions, the false issue, on which we say the Board and the courts have wandered astray, can be reviewed on a conflict; the real issue is not likely to present a conflict of decisions for it goes unrecog-

[5] *Superior Engraving Co.* v. *N. L. R. B.*, 183 F. 2d 783 (C.C.A. 7, 1950), cert. den. 340 U.S. 930.

nized. We respectfully suggest that the public policies against litigation of stale claims and in favor of following the plain meaning of congressional enactments warrant review here of a Board doctrine which is broadly opposed to those policies, and of dubious validity, at best.

Conclusion.

For the foregoing reasons it is respectfully urged that rehearing be granted and that, for the reasons set forth herein and in the petition for certiorari, upon such rehearing a writ of certiorari issue to the Fifth Circuit Court of Appeals in accordance with the petition filed herein on February 14, 1952.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

JOSEPH A. FANELLI
Counsel for Petitioner

Washington, D. C.
May, 1952.